

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

SISONGHKAME “KENNY”
PANYANOUVONG, *et al.*,

Plaintiffs,

v.

VONGSAKOUN APHAY a/k/a TINA APHAY,
a/k/a TING APHAY, AND THE MARITAL
COMMUNITY COMPOSED OF JUAN APHAY
AND VONGSAKOUN APHAY,

Defendants.

NO. 2:14-cv-00275 RSM

ORDER ON MOTIONS

THIS MATTER comes before the Court on Plaintiffs’ Motion for Temporary Restraining Order (Dkt. # 7) and Motion to Compel Defendants’ Participation in Framing Discovery Plan (Dkt. # 17). On June 2, 2014, the Court entered an Order converting the Motion for Temporary Restraining Order to a Motion for Preliminary Injunction and setting a briefing schedule and hearing date to allow Defendant Vongsakoun Aphay an opportunity to respond. Mrs. Aphay has since failed to file a responsive brief, to appear at the scheduled hearing, or to otherwise participate in this suit. Having considered the pleadings and the relevant record and for the reasons stated herein, the Court grants in part Plaintiffs’ Motion for Preliminary Injunction, grants Plaintiffs’ Motion to Compel, and orders Defendants to show cause why default judgment should not be entered against them.

Factual Background

Plaintiffs bring this action for fraud under the Securities and Exchange Act §§ 10(b)(5) and 29(b), common law fraud, and violation of the Washington Consumer Protection Act.

1 Plaintiffs are individuals in a community that emigrated from Laos to the United States and
2 Canada, predominantly in the 1970s and 1980s. They allege that Mrs. Vongsakoun Aphay
3 was instrumental in her husband, Mr. Juan Aphay's, perpetration of a sophisticated fraudulent
4 scheme that deprived them of substantial personal assets. *See* Dkt. # 1.

5 Plaintiff Sisongkham "Kenny" Panyanouvong, who attended school with Juan Aphay
6 in Laos, is the alleged first victim of the scheme. In 2007, Mr. Panyanouvong visited Mr.
7 Aphay in Houston, where Mr. Aphay told him that he worked for IBC, which owned the
8 Hostess companies, and had been operating as an independent distributor of Hostess products
9 for the last five or six years. *See* Dkt. # 8, ¶ 3. Mr. Aphay informed him that he possessed two
10 distribution routes in the Houston area and that IBC intended to sell additional routes to
11 independent distributors in order to cut costs. *See id.* Mr. Aphay represented himself as the
12 owner of the business "Bull's Eye Services," which possessed the exclusive right to purchase
13 delivery routes from IBC and the right to transfer them to other purchasers. He represented
14 that obtaining a route entitled the purchaser to great profits from the deliveries, specifically
15 that the original investment would be returned in 2 to 2.5 years with a 40% profit margin. *See*
16 *id.* at ¶ 4. Mr. Aphay represented that he would manage the routes and take a 15%
17 commission from the weekly payment for the deliveries. *See id.* at ¶ 5. While in Houston, Mr.
18 Panyanouvong saw a delivery truck used for Mr. Aphay's deliveries and personally checked
19 some of the stores on the delivery route. *See id.* at ¶ 4.

20 Mrs. Aphay was present at the meeting between Mr. Aphay and Mr. Panyanouvong.
21 Mr. Panyanouvong later learned that Mrs. Aphay had registered the company "Bulls Eye
22 Services" in her name and opened an account with Bank of America identifying herself as the
23 owner of the sole proprietorship. *See id.* at ¶ 5. Mr. Panyanouvong purchased one route in
24 2007. After it performed well, he continued to buy routes and advised family and members of
25 the Laotian expatriate community to participate. *See id.* at ¶ 6.

26 The additional Plaintiffs in this action also purchased delivery routes from Mr. Aphay.
One such purchaser was Plaintiff Kyle Louangrath, a high school friend of Mr. Aphay's in
Laos. *See* Dkt. # 8, ¶ 2. Mr. Aphay represented to Mr. Louangrath that the routes yielded 20 to
25% on the original investment without risk. *See id.* at ¶ 4. Mrs. Aphay witnessed these
statements and bragged about the wealth she had acquired in the enterprise, allegedly in order

1 to induce Mr. Louangrath's investment. *See id.* at ¶ 14. Mr. Aphay traveled extensively after
2 2010, visiting Mr. Louangrath and his wife at their home in Everett, WA, and displaying a
3 lavish lifestyle. *See id.* at ¶ 5. In alleged reliance on Mr. Aphay's representations, Mr.
4 Louangrath purchased Route 52 for \$72,950.75 in fall 2010, using funds from his and his
5 wife's savings and 401K accounts. Mr. Aphay also sold Mr. Louangrath and his wife a 25%
6 interest in Route 71 for \$92,083.25 on April 25, 2012. Mr. Louangrath made further deposits
7 on two routes in 2012 for \$4,375 and \$51,875, respectively. The net loss to Mr. and Mrs.
8 Louangrath has amounted to \$138,307.14. *See id.* at ¶¶ 6-8.

9 Plaintiffs allege that Defendants deposited their funds into Mrs. Aphay's "Bulls Eye
10 Services" checking account rather than using them for route purchases. Plaintiffs allege that
11 the Aphays thereafter used the funds solely for their personal consumption. *See, e.g.,* Dkt. # 8,
12 ¶ 7; Dkt. # 7. In addition to payments for false route purchases, Plaintiffs were required to pay
13 annual amounts, which they understood was to be used for the drivers' vacations and holiday
14 pay and for taxes due to the Internal Revenue Service. Plaintiffs assert that the Aphays used
15 these funds for their personal consumption as well. *See, e.g.,* Dkt. # 9, ¶ 12; Dkt. # 7.

16 On January 11, 2012, the Hostess companies filed for Chapter 11 bankruptcy. Mr.
17 Aphay assured those who inquired about the effects of the bankruptcy that their investments
18 were secure. He continued to solicit and accept new investments without informing investors
19 of the bankruptcy proceeding through November 2012, when the Court ordered that Hostess
20 liquidate its assets and the Aphays' scheme was uncovered. *See* Dkt. # 9, ¶ 13.

21 Plaintiffs allege that Mrs. Aphay was instrumental in the scheme to defraud them.
22 They allege that she accompanied Mr. Aphay at gatherings with investors and heard his
23 statements. They further allege that she knew those statements to be false and discussed her
24 wealth with potential investors to induce their participation.
25
26

Procedural Background

27 On October 28, 2013, Plaintiffs filed a complaint, nearly identical to the instant
28 complaint, against Juan Aphay as the sole Defendant in a separate action before this Court.
29 *See* Case No. 2:13-cv-01924RSM. Mr. Aphay failed to appear or defend, and default was
30 entered against him on December 3, 2013. The Court awarded default judgment against Juan
31

1 Aphay in the amount of \$2,988,40.22 plus interest, the identical award requested in the instant
2 action. Case No. 2:13-cv-01924, Dkt. # 27.

3 Plaintiffs filed the instant complaint against Mrs. Aphay and the marital community on
4 February 25, 2014. Dkt. # 1. Defendant Vongsakoun Aphay, appearing *pro se*, filed an
5 Answer on April 8, 2014, denying all claims and allegations. Dkt 5. On May 13, 2014,
6 Plaintiffs filed the instant Motion for Temporary Restraining Order and for Order to Show
7 Cause, moving the Court to restrain Defendants and any party acting on their behalf,
8 including Chase Bank, for transferring, assigning, selling, or otherwise disposing of property,
9 funds, assets, or securities held in Defendants' names. Plaintiffs also moved the Court for an
10 order directing Defendants to appear and show cause why a preliminary injunction should not
11 be entered restraining the disposal of their assets. *See* Dkt. # 7.

12 In reviewing the Motion, the Court discovered that the nearly identical former
13 complaint had been filed against Mr. Aphay and that default judgment had been awarded. As
14 this previous case was not mentioned by Plaintiffs in their Motion, the Court entered an Order
15 to Show Cause why the claims raised in this lawsuit are not barred under the doctrine of *res*
16 *judicata* based on the entry of default judgment in Case No. 2:13-cv-01924RSM. The Court
17 further ordered counsel to show cause why sanctions should not be imposed for failure to alert
18 the Court to the previous adjudication of these claims. *See* Dkt. # 11.

19 After receiving Plaintiffs' response to the show cause order (Dkt. # 12), the Court
20 entered an Order denying Plaintiffs' Motion for Temporary Restraining Order as Plaintiffs
21 failed to demonstrate that irreparable injury would occur before Mrs. Aphay could be heard in
22 opposition. The Court accordingly construed the Motion as one for preliminary injunction and
23 set a briefing schedule as well as the instant hearing date. *See* Dkt. # 16. Mrs. Aphay has
24 failed to respond as directed or to otherwise participate in this action subsequent to filing her
25 Answer in April.

26 Due to Defendants' lack of participation in the suit, Plaintiffs filed a Motion to
Compel on June 16, 2014. Dkt. # 17. Plaintiffs allege that Mrs. Aphay has failed to respond to
Plaintiffs' attempts to confer in framing a discovery plan or to participate in the Court-ordered
Fed. R. Civ. P. 26(f) conference. They consequently move the Court to enter an order
compelling her participation in framing a discovery plan and to award attorneys' fees

1 associated with having to bring this motion and additional sanctions as appropriate.

2 Analysis

3 Res Judicata

4 As an initial matter, prior to reaching Plaintiffs' motion for injunctive relief, the Court
5 solicited briefing from Plaintiffs as to whether the instant action should be barred by the
6 doctrine of res judicata, given the Court's grant of default judgment in the identical action
7 brought against Defendant's husband. The Court finds Plaintiffs' response satisfactory and
8 allows this matter to proceed for the reasons provided below. The Court reminds counsel that
9 "in an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to
10 the lawyer which will enable the tribunal to make an informed decision, whether or not the
11 facts are adverse." *Campbell v. Rice*, 408 F.3d 1166, 1175 (9th Cir. 2005). Nonetheless, the
12 Court finds that counsel's omission of facts related to the previous action against Mr. Aphay
13 was inadvertent and filings were made in good faith and hence refrains from imposing
sanctions.

14 In general, where, as here, claims are brought in separate lawsuits against multiple
15 parties who are liable for the same harm, the court considers the claims to be separate.
16 Restatement (Second) of Judgment § 49(a) (1982). "Accordingly, a judgment for or against
17 one obligor does not result in merger or bar of the claim that the injured party may have
18 against another obligor." *see also Central Hudson Gas & Elec. Corp. v. Empresa Naviera*
19 *Santa S.A.*, 56 F.3d 359, 367 (2d. Cir. 1995) ("When a litigant files consecutive lawsuits
20 against separate parties for the same injury, the entry of a judgment in the prior action does
21 not bar the claims against other potentially liable parties."). However, a plaintiff's ability to
22 maintain separate actions against multiple obligors is subject to important constraints,
23 including claim preclusion and the rule against double recovery. Double recovery is
24 "foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject
25 of two or more judgments." Restatement (Second) of Judgment § 49(a). "A payment by one
26 person liable for a loss reduces pro tanto the amount that the injured person is entitled to
receive from other persons liable for the loss." Restatement (Second) of Judgment § 50(c).
See Royal Indem. Co. v. Olmstead, 193 F.2d 451, 455 (9th Cir. 1951) ("The general rule is

1 that when a plaintiff secures satisfaction of a judgment against one joint tort-feasor,
2 judgments against other joint tort-feasors are thereby deemed satisfied.... [A] plaintiff should
3 have but one recovery for the injuries suffered.”); *St. Clair v. Eastern Air Lines, Inc.*, 302 F.2d
4 477, 479 (2d Cir. 1962) (holding that where plaintiff brought separate claims against joint
5 tort-feasors in two different suits, “the total recovery against them must be limited to the
6 amount of the larger of the two judgments.”).

7 “Res judicata, or claim preclusion, ‘bars any lawsuits on any claims that were raised or
8 could have been raised in a prior action.’” *F.T.C. v. Garvey*, 383 F.3d 891, 897 (9th Cir. 2004)
9 (quoting *Providence Health Plan v. McDowell*, 361 F.3d 1243, 1249 ((9th Cir. 2004)). Claim
10 preclusion applies where there is (1) an identity of claims, (2) final judgment on the merits,
11 and (3) identity or privity between parties. *Id.* Default judgments are considered final
12 judgments on the merits for purposes of res judicata and “are thus effective for the purposes
13 of claim preclusion.” *In re Garcia*, 313 B.R. 307, 311-12 (9th Cir. 2004) (quoting *Howard v.*
14 *Lewis*, 905 F.2d 1318, 1323 (9th Cir. 1990)).

15 For the purposes of res judicata, privity “is a legal conclusion designating a person so
16 identified in interest with a party to former litigation that he represents precisely the same
17 right in respect to the subject matter involved.” *Id.* (quoting *In re Schimmels*, 127 F.3d 875,
18 881 (9th Cir. 1997)). “Privity is a flexible concept dependent on the particular relationship
19 between the parties in each individual set of cases.” *Id.* (internal citation and quotation
20 omitted); see also *Va. Sur. Co. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1247 (9th Cir.
21 1998). In *F.T.C. v. Garvey*, the Ninth Circuit found that claim preclusion did not apply where
22 there was no indication that defendants were acting on behalf of those in the prior lawsuit and
23 where they were not sufficiently connected to justify barring the later brought claims. 383
24 F.3d at 898.

25 The Court finds that claim preclusion does not bar the instant lawsuit where Plaintiffs
26 lacked sufficient information to name Mrs. Aphay in the first lawsuit and where evidence
does not establish that the Aphays were in privity. In assessing whether a claim is precluded,
the Court may consider whether a plaintiff had sufficient information to name a particular
defendant in a prior action. *Cent. Hudston Gas*, 56 F.3d at 367. Here, evidence submitted by
Plaintiffs shows that they lacked substantial evidence of Mrs. Aphay’s complicity in and

1 financial benefit from the fraudulent scheme at the time they filed the first action. *See* Dkt. #
 2 13, ¶¶ 3, 4. While naming Mrs. Aphay in the prior action may have been prudent, it was not
 3 required. Further, in determining whether privity exists, the Court looks to whether a party
 4 “controlled or substantially participated in the control of the presentation on behalf of a party
 5 to the prior action.” *Cent. Hudson Gas*, 56 F.3d at 368 (internal quotation and citation
 6 omitted). Where a defendant in a second action did not substantially control the defense in the
 7 first action, privity does not exist.¹ *Id.* Although Plaintiffs alleged that the Aphays conspired
 8 in the underlying offense, there is no indication that Mrs. Aphay controlled Mr. Aphay’s
 9 default in the prior case. Her entry of an appearance in the instant action suggests otherwise.
 10 Accordingly, despite the substantial identity of claims and entry of final judgment on the
 11 merits in the prior action, the Court finds that privity is lacking and that res judicata therefore
 12 does not bar the instant action. Any award granted in this case shall be conditioned on the
 13 non-satisfaction of the judgment against Mr. Aphay in Case No. 2:13-cv-01924RSM so as to
 14 prevent double recovery.

15 **Preliminary Injunction**

16 A “preliminary injunction is an extraordinary remedy never awarded as of right.”
 17 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). It is not enough that a
 18 plaintiff establish that it is possible that irreparable harm will result if relief is not granted.
 19 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). To obtain a
 20 preliminary injunction, the moving party must establish: (1) a likelihood of success on the
 21 merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary
 22 relief; (3) that the balance of the equities tips in her favor, and (4) that an injunction is in the
 23 public interest. *Winter*, 444 U.S. at 24. *See also*, *Sierra Forest Legacy v. Rey*, 577 F.3d 1015,
 24 1021 (9th Cir. 2009). The court may balance these elements such that “a strong showing of
 25 one element may offset a weaker showing of another.” *Alliance for Wild Rockies*, 632. F.3d at
 26 1131.

¹ In addition, the relationship between husband and wife does not, in itself, give rise to privity for purposes of claim preclusion. *See* Moore’s Federal Practice 3d. Vol. 18, § 131.40(d)(3) (2014).

1 With respect to the first element, Plaintiffs have shown that they are likely to succeed
2 in proving that Mrs. Aphay fraudulently deprived them of their assets for her own personal
3 gain. Plaintiffs present extensive, uncontroverted evidence of the fraudulent scheme. The
4 entry of default judgment in the prior case underscores Plaintiffs' chance of success on the
5 merits. Here, the Court further construes Mrs. Aphay's failure to respond to the instant
6 Motion and to appear for this hearing as an admission that the facts and claims alleged have
7 merit. *See* LCR 7(b)(2) ("Except for motions for summary judgment, if a party fails to file
8 papers in opposition to a motion, such failure may be considered by the court as an admission
9 that the motion has merit.").

10 With respect to the second prong, Plaintiffs must demonstrate that irreparable harm is
11 likely, and not merely possible. *See Johnson v. Coutier*, 572 F.3d 1067, 1081 (9th Cir. 2009)
12 (citing *Winter*, 555 U.S. at 24). Where a party seeks an asset freeze, the party must show that
13 it is likely that the claimed assets will be dissipated, or that it will be otherwise unable to
14 recover monetary damages if relief is not granted. *Id.* at 1085. In *Johnson*, the Ninth Circuit
15 found that a defendant, who had impermissibly awarded himself tens of millions of dollars in
16 compensation, was "presumably more than capable of placing assets in his personal
17 possession beyond the reach of a judgment." *Id.* As in *Johnson*, the Court finds that the
18 Aphays' own conduct establishes that is likely that in the absence of an asset freeze, Plaintiffs
19 will not be able to recover the funds. As the Aphays have demonstrated a propensity to
20 consume illegally begotten monies for their personal pleasure, Plaintiffs will be irreparably
21 harmed if the Aphays continue to do so despite the initiation of this Court action. The
22 likelihood of harm is underscored by the substantial disrespect for the authority of the Court
23 that the Aphays have demonstrated by failing to appear and defend in the first action and to
24 respond to Court orders in the instant one.

25 Both the balance of the hardships and the public interest favor granting injunctive
26 relief in this case. Plaintiffs have lost a significant portion of their personal savings and are
having to expend additional savings prosecuting this action against Defendants who fail to
properly participate. While Defendants will be undeniably burdened by an asset freeze, this
freeze shall be conditioned to allow their access to funds for reasonable living expenses to
minimize undue hardship. The public interest also favors the award of a preliminary

1 injunction to prevent the perpetration of fraud against trusting friends and members of the
2 expatriate Laotian community.

3 Having found that preliminary injunctive relief should issue, the Court must require
4 the movant to “give[] security in an amount that the court considers proper to pay the costs
5 and damages sustained by any party found to have been wrongfully enjoined or restrained.”
6 Fed.R.Civ.P. 65(c). The district court enjoys broad discretion in setting the bond amount,
7 which may be set at zero if there is no evidence that the enjoined party will suffer damages
8 from a wrongful injunction. *See Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000). The
9 Court finds that the risk that Defendants will be wrongfully enjoined is minimal, given
10 Defendants’ failure to oppose the instant Motion and the weight of the evidence supporting
11 Plaintiffs’ substantial likelihood to succeed on the merits. Moreover, the risk that Defendants
12 would suffer damages in the unlikely event of wrongful injunctive relief is minimal, as the
13 injunction merely preserves Defendants’ assets during the pendency of this litigation and
14 carves out an allowance for ordinary living expenses to avoid undue burden. The Court
15 accordingly sets the bond amount at zero.

16 As to the form of relief, the Court enjoins Defendants from disposing of property,
17 funds, assets or securities in their name or held in the name of any company owned or
18 operated by them, except for payment of expenses in the ordinary course of living. Such relief
19 is clearly warranted and within the authority of the Court to provide. As to Plaintiffs’
20 additional request for an injunction barring Chase Bank and other unnamed third-parties from
21 disposing of Defendants’ assets, the Court finds that it lacks authority to grant such relief, and
22 Plaintiffs formally relinquished this request upon oral argument.

23 **Motion to Compel**

24 Plaintiffs additionally move the Court for an order compelling Defendants’
25 participation in framing a discovery plan. *See* Dkt. # 17. On May 27, 2014, the Court issued a
26 scheduling order requiring the parties to hold a Fed. R. Civ. P. 26(f) Conference by 6/9/2014
and to provide initial disclosures by 6/16/2014 and a joint status report by 6/23/2014. Plaintiffs
aver that, despite repeated efforts to contact Mrs. Aphay by mail and fax at the addresses
provided, they have received no response and Defendants have failed to abide by any of these

1 Court-ordered deadlines. *See* Dkt. # 18. In light of Plaintiffs' diligent efforts and Mrs.
2 Aphay's neglect of the Court's Orders, the Court finds that good cause exists to grant the
3 requested relief.

4 Federal Rule of Civil Procedure 37(f) provides that where "a party or its attorney fails
5 to participate in good faith in developing and submitting a proposed discovery plan as
6 required by Rule 26(f), the court may, after giving an opportunity to be heard, require that
7 party or attorney to pay to any other party the reasonable expenses, including attorney's fees,
8 caused by the failure." Having found that Defendants failed to participate in developing a
9 proposed discovery plan and having afforded Defendants a reasonable opportunity to be
10 heard, of which Mrs. Aphay failed to avail herself, the Court finds that an award of attorney's
11 fees associated with preparation of the instant Motion to Compel is warranted. Plaintiffs shall
12 submit documentation as to the reasonable expenses incurred in preparing the instant Motion
13 if they wish to pursue this award.

14 **Order to Show Cause**

15 The Federal Rules further allow for this Court to sanction Defendants, including
16 through the entry of default judgment, for their failure to provide or permit discovery. *See*
17 Fed. R. Civ. P. 37(b)(2)(A) ("If a party...fails to obey an order to provide or permit discovery,
18 including an order under Rule 26(f)..., the court where the action is pending may issue further
19 just orders [, including] (vi) rendering a default judgment against the disobedient party.").
20 Defendants have failed to take any action in this case subsequent to their Answer, thereby
21 disobeying multiple orders of the Court, including those related to provision of discovery.
22 Forcing Plaintiffs to prosecute an action where Defendants have effectively defaulted causes
23 undue prejudice to Plaintiffs and clogs this Court's calendar with futile motions. In the
24 entrance of judicial economy and the just and fair resolution of this action, the Court
25 accordingly orders Defendants to show cause within twenty (20) days of the entry of this
26 Order why default judgment should not be entered against them based on their failure to
participate in discovery and to abide by the Orders of this Court.

Conclusion

For the reasons stated herein, the Court hereby finds and ORDERS as follows:

(1) Plaintiffs' Motion for Temporary Restraining Order, construed as a Motion for Preliminary Injunction (Dkt. # 7), is GRANTED in part as follows:

a. Defendants Vongsakoun Aphay and the marital community composed of Juan Aphay and Vongsakoun Aphay are immediately restrained from transferring, assigning, selling, hypothecating, changing, wasting, dissipating, converting, concealing, encumbering, or otherwise disposing of, in any manner, property, funds, assets or securities held in the name of Defendants, or either of them, or in the name of any company controlled by the Defendants, or either of them, except for payment of expenses in the ordinary course of living.

(2) Plaintiffs' Motion to Compel (Dkt. # 17) is GRANTED.

a. Defendants are hereby ORDERED to participate in the framing of a discovery plan pursuant to Fed. R. Civ. P. 26(f).

b. Defendants are liable for Plaintiffs' reasonable attorney's fees and costs incurred in filing this Motion to Compel. Plaintiffs shall submit documentation of reasonable fees and costs if they wish to pursue a fee award.

(3) Defendants are ORDERED to SHOW CAUSE within twenty (20) days of the entry of this Order why default judgment should not be entered against them on account of their failure to participate in discovery and to abide by the Orders of this Court.

(4) The Clerk is directed to forward a copy of this Order to Defendants at the addresses provided.

DATED this 1 day of July 2014.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE